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IN THE SUPREME COURT OF THE
UNITED STATES OFFICE OF THE CLERK

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER,

v.

JAMES WILLIE COCHRAN,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is certiorari review by this Court merited where the Court of Appeals ignored the precedent of this Court and its own precedent in holding that a claim found by the State courts to be procedurally barred could be reviewed on the merits in Cochran's federal habeas corpus proceeding because the State courts did not consistently apply its procedural bar?

PARTIES

The caption contains the names of all the parties.

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OPINIONS BELOW

Petitioner/Appellee/Cross-Appellant James Willie Cochran ("Cochran") was convicted and sentenced to death in Jefferson County, Alabama, for the capital offense of robbery when the victim is intentionally killed. Ala. Code §13A-5-31(a)(2) (1975). The state court trial and direct appeal proceedings have been accurately summarized by the Alabama Court of Criminal Appeals as follows:

> In August of 1977, Cochran was originally tried for a capital offense involving the murder of Stephen Jerome Ganey. The trial ended in a mistrial granted pursuant to Cochran's motion ... In January of 1978, Cochran was tried a second time for a capital offense. His conviction was reversed on appeal on authority of Beck v. State, 396 So.2d 645 (Ala. 1980) ... In March of 1982, Cochran was tried a third time and convicted.

Cochran v. State, 500 So.2d 1161, 1165 (Ala.Crim.App. 1984).

> That conviction and sentence were ultimately affirmed on appeal.

> Cochran v. State, 500 So.2d 1161 (Ala.Crim.App. 1984), affirmed in part, reversed in part, and remanded Ex parte Cochran, 500 So.2d 1188 (Ala.Crim.App. 1986), affirmed, Ex parte Cochran, 500 So.2d 1064 (Ala. 1986), cert. denied, Cochran v. Alabama, 481 U.S. 1033 (1987).

Cochran v. State, 548 So.2d 1062, 1063 (Ala.Crim.App. 1989).

On June 12, 1987, Cochran filed a collateral petition for relief from conviction or sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. An evidentiary hearing was held on February 16, 1988, and in an order in the nature of an opinion, entered on April 8, 1988, the state collateral court denied Cochran's petition. The Alabama Court of Criminal Appeals affirmed the denial of relief on appeal. Cochran v. State, 548 So.2 1062 (Ala.Crim.App. 1989), cert. denied, 548 So.2d 1062 (Ala.), cert. denied, 493 U.S. 900 (1989).

On June 21, 1990, Cochran filed a habeas corpus petition in the United States District Court for the Northern District of Alabama. On August 30, 1990, the State of Alabama[1] filed an answer and on September 25, 1990, filed an amended answer. Following discovery, an evidentiary hearing was held on July 15, 1991, and October 15, 1991.

In an order entered on June 8, 1993, the federal district court granted Cochran conditional relief by ordering a new sentencing hearing. (This order can be found in the appendix to this petition.) The federal district court concluded that

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[1]Respondent/appellant/cross-appellee Tommy Herring is a party only because of his custodial status over Cochran. Therefore, in this petition for writ of certiorari, references will be to the State of Alabama, which is the real party in interest, instead of to Herring.

the performance of Cochran's counsel in failing to conduct a background investigation prior to the penalty phase of the case in 1982 was constitutionally deficient. The federal district court held that all other claims were either defaulted or without merit.

On June 15, 1993, the State of Alabama filed a motion to alter the judgment which the federal district court denied on July 22, 1993. On June 22, 1993, Cochran filed a motion for reconsideration, and to alter judgment, or to amend judgment which the federal district court granted on July 22, 1993. In that July 22, 1993, order, the federal district court ordered an evidentiary hearing be held so that Cochran could present evidence on the Batson claim. (This order can be found in the appendix to this petition.) On November 22, 1993, an evidentiary hearing was held on the Batson claim. (This order can be

found in the appendix to this petition.) On November 24, 1993, the federal district court granted Cochran relief on the Batson claim. On December 3, 1993, the State of Alabama filed a notice of appeal and a motion to stay the judgment pending this appeal. That motion was granted on December 7, 1993. On December 17, 1993, Cochran filed a notice of appeal and a motion for certificate of probable cause. That motion was granted on December 20, 1993.

After briefing and hearing oral argument from the parties; the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") affirmed the district court's grant of relief on the Batson claim. Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995). The Court of Appeals did not address any other issue because it granted relief on the Batson claim. On January 30, 1994, the State of Alabama filed a petition

for rehearing. On July 26, 1995, the Court of Appeals, in response to the State of Alabama's petition for rehearing, modified its opinion by deleting a citation from its panel opinion. (This opinion can be found in the appendix to this petition.) The State of Alabama's petition for rehearing was otherwise denied. On August 22, 1995, the Court of Appeals, pursuant to a motion made by the State of Alabama, stayed the issuance of the mandate to and including October 24, 1995.

GROUNDS OF SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction to review the decision of the Court of Appeals dated January 10, 1995, and from the Court of Appeals' decision denying the State of Alabama's petition for rehearing dated July 26, 1995, by writ of certiorari based on 28 U.S.C. §1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground: (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b). Rule 32.2(a)(5), Alabama Rules of Criminal Procedure.

INTRODUCTION

The State of Alabama respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals granting Cochran's Batson[2] claim for post-conviction relief.

The Court of Appeals ruled that, in cases such as Cochran's,[3] the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain [v. Alabama, 380 U.S. 202 (1965)] objection at trial." Cochran v. Herring, 43 F.3d at 1409. However, the Court of Appeals only

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[2]Batson v. Kentucky, 476 U.S. 79 (1986).

[3]Cases in the same procedural context as Cochran's were tried before Batson was decided in April 1986, but were pending on direct appeal when Batson was decided. Under Griffith v. Kentucky, 479 U.S. 314 (1987), Batson applies retroactively to such cases.

identified one case, Ex parte Floyd, 571 So.2d 1234, 1235-36 (Ala. 1990), where an Alabama state appellate court allowed a state collateral petitioner to raise a Batson claim despite the claim being in procedural default.[4] One aberrant decision by a state court ignoring a state procedural rule is not sufficient to apply the sporadic application of the state procedural rule which would allow a federal court to review the merits of a procedurally defaulted claim.

The State of Alabama believes that the Court of Appeals' decision in this case is in direct conflict with a decision of this Court. In Dugger v. Adams, 489 U.S. 401,

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[4]In Floyd, the petitioner had not raised the Batson claim on direct appeal. Rule 32.2(a)(5) of the Alabama Rules of Criminal Procedure states that a claim is procedurally defaulted if it could have been but was not raised on direct appeal.

410 n. 6 (1989), this Court indicated that when state courts have followed a procedural rule "faithfully" in "the vast majority of cases," and have deviated from the procedural bar in only a "few cases," those deviations may not establish failure "to apply procedural rules[s] regularly and consistently." In fact, the Court of Appeals holding in this case conflicts with its own prior decision which held that, despite one prior decision of a state court ignoring a procedural default, Florida courts consistently applied the procedural bar. Delap v. Dugger, 890 F.2d 285, 300-01 (11th Cir. 1989).

This is a case where the federal courts have not shown respect for Alabama's adequate and independent state procedural ground. In the words of Justice O'Conner:

> This is a case about federalism. It concerns the respect that federal courts owe the states and the states' procedural rules when reviewing the

> claims of state prisoners in federal habeas corpus.

Coleman v. Thompson, 111 S.Ct. 2546, 2552 (1991).

STATEMENT OF THE CASE

Since the only issue before this Court relates to Cochran's Batson claim, the State of Alabama's discussion of the prior court proceedings will be limited to those matters that pertain to the Batson claim. The federal district court's grant of guilt stage relief, and the Court of Appeals' affirmance, based upon the Batson v. Kentucky, 476 U.S. 79 (1986), claim was error because both courts (for different reasons) disregarded the fact that the claim was procedurally barred.

A. The Procedural Posture of the Batson Claim

1. The Trial Court

Cochran was initially tried in August of 1977. A mistrial was granted during the trial of that case. Cochran, 500 So.2d at 1165, 1181. On February 28, 1977, before that initial trial, Cochran filed a "motion to restrict prosecutorial strikes" which requested that "the District Attorney and his staff be restricted from using their peremptory strikes in a racially biased manner and, in the alternative, that the District Attorney and his staff not be allowed to use the peremptory strikes." At the trial, there was no objection raised to the prosecution's use of peremptory challenges.

Cochran was re-indicted, convicted, and sentenced to death in 1978. On March 31, 1981, that conviction and sentence were

reversed on authority of Beck v. Alabama, 447 U.S. 625 (1980).

Cochran was tried again, for the third time, and convicted in March of 1982. This is the trial and conviction which is the subject of Cochran's federal habeas corpus petition.

The record of the 1982 trial shows that at the conclusion of the voir dire of the jury and before the actual striking of the jury began, defense counsel reversed his motion, initially filed at the first trial, by stating "we move at this time to have His Honor restrict the State from arbitrarily stiking blacks from the jury."

2. The Direct Appeal of the Conviction

On direct appeal, Cochran's conviction and sentence were affirmed by the Court of Appeals. Cochran v. State, 500 So.2d 1161 (Ala.Crim.App. 1984). Cochran did not raise the claim concerning the peremptory

strikes made by the State. The Alabama Supreme Court remanded the case "to the Court of Criminal Appeals for that court to order a new sentencing hearing, at which the trial judge is required to issue specific written findings on all evidence of mitigating factors." Ex parte Cochran, 500 So.2d 1179, 1186-1187 (Ala. 1985). In his appeal to the Alabama Supreme Court, Cochran did not raise the claim concerning the peremptory strikes made by the State.

The case of Batson v. Kentucky was decided on April 30, 1986. On May 27, 1986, the Court of Criminal Appeals extended its original opinion to state that the trial court properly did not hold a new sentencing hearing and that the ministerial duty of correcting the sentencing order had been accomplished by the trial court. Cochran v. State, 500 So.2d 1188 (Ala.Crim.App. 1986). In its review of the case, the Alabama Supreme Court agreed with

the lower appellate court and stated that a new sentencing hearing was not necessary since the trial court only had to correct its original sentencing order. Cochran's appeal became final on April 27, 1987 when the United States Supreme Court denied certiorari. Cochran did not raise a Batson claim in a supplemental brief to either Alabama appellate court. Therefore, Cochran did not properly raise a peremptory strike claim at trial or on appeal, although he could have done so.

3. The Petition And Resulting Evidentiary Hearing Conducted According To Rule 32[5] Of The Alabama Rules Of Criminal Procedure

On June 12, 1987, Cochran filed a Rule 32 petition attacking his conviction and sentence. R13-TabR-62-163.[6] This petition did not raise a Batson claim. On February 1, 1988, Cochran filed an amendment to the Rule 32 petition raising a Batson claim for the first time in a state court. R1-3-TabR-62-183. This claim was raised as an independent constitutional

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[5]The petition was filed pursuant to Temporary Rule 20 of the Alabama Rules of Criminal Procedure. Upon the permanent adoption of the rules, Temporary Rule 20 became Rule 32.

[6]All references are made according to the instruction of the Court of Appeals. To be consistent, the State of Alabama will continue with the Court of Appeals' reference system.

violation and not as an ineffective assistance of counsel for not raising a Batson claim. An evidentiary hearing was held on the Rule 32 petition by Judge Cole on February 16, 1988.

On the day of the evidentiary hearing, there was much discussion on whether the Batson claim was in procedural default. It is clear from the following colloquy that the Batson claim was held procedurally barred by the Rule 32 trial court:

> MR. GIBBS [assistant attorney general]: This case was on direct appeal when Batson was decided. My only -- The State's only position is that it's a valid State's procedural rule, Rule 20.2(a)(2) and (5), prohibit this Court from hearing the case. And that's the State's position.
>
> MR. SOGOL: [Cochran's attorney]: And I think that -
>
> THE COURT: I was under the impression I just adopted that -- your ruling or your explanation of it. Didn't I say I wouldn't touch it?
>
> MR. SOGOL: Well, I wasn't sure if Your Honor was talking at that point as to whether it was still an issue

> in the competency of counsel issue. And that's why I guess I went on to explain our position. If Your Honor is going to hold that we're procedurally barred, then we won't present it.
>
> THE COURT: I so rule.

R1-3-TabR-60-22-23. At this point, Cochran's counsel made an oral request to amend the petition to include an ineffective assistance of appellate counsel claim because counsel failed to raise the Batson issue. R1-3-TabR-60-24. The State of Alabama objected to the oral amendment. R1-3-TabR-60-25. The Rule 32 trial court agreed with the State and did not allow the oral amendment. R1-3-TabR-60-28. No evidence was presented at the evidentiary hearing relating to Batson. In addition to orally holding the Batson claim procedurally barred, the Rule 32 trial court denied the Batson claim in the alternative, because it lacked merit. R1-3-TabR-61-157-159.

4. The Appeal From The Denial Of The Rule 32 Petition

In his brief to the Court of Criminal Appeals on appeal from the denial of his Rule 32 petition, Cochran raised the independent Batson claim and the claim of ineffective assistance of appellate counsel for not raising a Batson claim. The Alabama Court of Criminal Appeals held the independent Batson claim procedurally defaulted because it could have been but was not raised on direct appeal. Cochran v. State, 548 So.2d 1062, 1067-1068 (Ala.Crim.App. 1989). The Court of Criminal Appeals also held that, alternatively, the Batson claim lacked merit. Cochran, 548 So.2d at 1063-1069.

The Court of Criminal Appeals also acknowledged that the Rule 32 trial court acted properly in not allowing Cochran to orally amend his petition to include a

claim of ineffective assistance of appellate counsel for not raising Batson. Cochran, 548 So.2d 1074-1075. The Court, alternatively held the Batson ineffective assistance of counsel claim to be without merit. Cochran, 548 So.2d at 1069-1070.

5. The Federal Habeas Petition

On October 3, 1990, Judge Pointer denied Cochran discovery on the Batson[7] claims stating that they were procedurally barred. R-1-6-2,3-4 (This opinion can be found in the appendix to the petition). Despite holding Batson procedurally barred and denying a motion for reconsideration of this ruling, the federal

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[7]The independent Batson claim was addressed by Judge Pointer on page two of his order and the Batson ineffective assistance of counsel claim was addressed on pages three and four.

district court, after holding an evidentiary hearing on other issues, held that the Batson claim was not procedurally defaulted but denied the claim on the merits. Opinion of June 9, 1993, R1-23-10-15. Cochran filed a motion titled "Petitioner's Motion for Reconsideration and Request to Alter or Amend Judgment and Findings" which the federal district court granted on July 21, 1993.[8]

After holding an evidentiary hearing on the Batson claim, the federal district court granted Cochran habeas relief based upon the independent Batson claim. Opinion of November 24, 1993. The federal district court ruled that the Batson claim was not procedurally barred because the last state

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[8]This motion requested that the federal district court hold an evidentiary hearing on the Batson claim.

court rendering a judgment in the case did not clearly and expressly state that its judgment rested on a state procedural rule. R1-23-10-15; Harris v. Reed, 489 U.S. 255, 263 (1989). The State of Alabama argued that both the state circuit court and the Alabama Court of Criminal Appeals made clear and express statements that the Batson claim was procedurally barred.

6. The Court of Appeals' Opinion

The Court of Appeals affirmed the federal district court on other grounds and offered no opinion regarding whether the Alabama Court of Criminal Appeals clearly and expressly relied on the state procedural bar. Instead, the Court of Appeals held that, in cases in the same

procedural context as Cochran's,[9] the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain claim at trial." Cochran v. Herring, 43 F.3d at 1409. As a result, the Court of Appeals held that the procedural bar does not constitute an adequate and independent state ground which bars federal review.

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[9]As the Court of Appeals stated "[t]he procedural posture of Cochran's case is unusual." Cochran, 43 F.3d at 1409. The Court of Appeals identified these unique characteristics as follows: The case was tried pre-Batson, but the Batson issue was preserved because Cochran asserted a Swain objection; Cochran did not challenge the selection of the jury while the case was on direct review; Batson was decided after Cochran's conviction was affirmed, but while his sentence was still being reviewed by the Alabama Court of Criminal Appeals; and the Batson claim was asserted for the first time in a state post-conviction proceeding. Cochran, 43 F.3d at 1409.

REASONS FOR GRANTING REVIEW

I. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE THE SPECIAL AND IMPORTANT FEDERAL QUESTION RELATING TO THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRONEOUSLY REVIEWING THE MERITS OF A CLAIM THAT THE STATE COURTS HELD WAS PROCEDURALLY BARRED BECAUSE OF A STATE PROCEDURAL RULE

Under the doctrine of procedural default, a federal court is barred from reaching the merits of a state prisoner's federal habeas claim where there is a failure to comply with an independent and adequate state procedural rule. Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977). A federal court is not required to honor a state procedural ruling unless the ruling rests on an independent and adequate state ground.

On direct appeal, Cochran did not raise the claim concerning the peremptory strikes made by the State. The fact that Cochran

did not raise this claim on direct appeal is uncontroverted and unrefuted. Alabama has a procedural rule that states "[a] petitioner will not be given relief under this rule based upon any ground ... which could have been but was not raised on appeal ...." Rule 32.2(a)(5), Alabama Rules of Criminal Procedure. Therefore, it is clear that the independent Batson claim was in procedural default because it could have been but was not raised on direct appeal.

Cochran's state post-conviction counsel did attempt to raise a Batson claim at the post-conviction evidentiary hearing. As stated in this brief at pp. 9-11, the state circuit court clearly held the independent Batson claim procedurally defaulted because the claim had not been raised on direct appeal. At this point, which was minutes before the state court evidentiary hearing was to begin, Cochran's state post-

conviction counsel made an oral request to amend the petition to include an ineffective assistance of appellate counsel claim because counsel failed to raise the Batson issue. R1-3-TabR-60-24. The State objected to this last-minute amendment and the state circuit court sustained the objection and did not allow the untimely oral amendment.[10] R1-3-TabR-60-28. No evidence was presented at the state court evidentiary hearing relating to Batson.

In his brief to the Alabama Court of Criminal Appeals on appeal from the denial of his Rule 32 petition, Cochran raised the independent Batson claim and the claim of

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[10]In Alabama, it is within the post-conviction court's discretion on whether to allow an amendment. Rule 32.7(b), Alabama Rules of Criminal Procedure.

ineffective assistance of appellate counsel for not raising the Batson issue. Based upon the state procedural ground for not raising the claim on direct appeal, the Alabama Court of Criminal Appeals ruled that the independent Batson claim was procedurally defaulted. Cochran v. State, 548 So.2d 1062, 1067-1068 (Ala.Crim.App. 1989). The Alabama Court of Criminal Appeals also upheld the post-conviction trial court's refusal to allow the last minute amendment to include a claim of ineffective assistance of appellate counsel for not raising Batson. Cochran, 548 So.2d at 1074-1075. Since the Alabama Supreme Court denied certiorari, the Alabama Court of Criminal Appeals was the last state court to review the Batson claim. The ruling by the state courts that the Batson claim was procedurally barred should have been honored by the federal courts because: the State of Alabama asserted the

default in a timely manner; Alabama has an applicable procedural rule that Cochran violated; Alabama's procedural rule is adequate and independent; and the Alabama state courts actually relied upon the procedural rule to deny Cochran relief.

The federal district court and the Court of Appeals did not honor the state courts' ruling that the Batson claim was procedurally defaulted, but for different reasons. The federal district court held that the Alabama Court of Crimina Appeals did not clearly and expressly rely on the state procedural bar because the state court addressed the merits of the underlying federal claim in deciding the procedural state law question. R1-22 at 11-12. The Court of Appeals affirmed the federal district court on other grounds and offered no opinion regarding whether the Alabama Court of Criminal Appeals clearly and expressly relied on the state

procedural bar. Instead, the Court of Appeals held that, in cases such as Cochran's, the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain objection at trial." Cochran v. Herring, 43 F.3d at 1409.

To the best of the State of Alabama's knowledge, there are three cases[11] that share the following characteristics: the case was tried pre-Batson; a Swain objection was made at trial; the issue regarding the selection of the jury was not raised on direct review in the state appellate courts. In Cochran and

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[11]The three cases are the present case and Ex parte Floyd, 571 So.2d 1234 (Ala. 1990); and, Morrison v. State, 551 So.2d 435 (Ala.Crim.App. 1989).

Morrison,[12] the state post-conviction courts properly held that the Batson claim was procedurally defaulted because the claim had not been raised on direct appeal. In Floyd, the Alabama Supreme Court erroneously remanded the case for a Batson hearing, despite the Batson claim being procedurally defaulted. Therefore, of the three cases that share the above-stated characteristics, the Alabama state courts did not correctly apply the procedural bar in only one of those cases.

In its opinion in the Floyd case, the Alabama Supreme Court noted several

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[12]In a supplemental motion to the Court of Appeals, the State of Alabama filed papers which show that Morrison's habeas petition was denied on January 19, 1995. However, because of the Court of Appeals' ruling in Cochran, the Morrison federal district court stated that it "shall reserve final ruling on this matter until ... the United States Supreme Court disposes of the Cochran case."

characteristics that were present in Floyd, that were not present in either Cochran or Morrison. First, is the manner in which the Swain objection was raised at trial. In the Floyd case, defense counsel, following the selection of the jury, moved for a mistrial and asked that a new jury be impaneled on the ground that the pattern of strikes by the district attorney was a systematic exclusion of all blacks from the jury. Ex parte Floyd, 571 So.2d at 1222. Defense counsel then presented evidence that the district attorney used his first 11 strikes to remove the 11 black members of the jury venire. Id. After this presentation, defense counsel questioned the district attorney about the use of his peremptory challenges. The district attorney responded that he struck people who "would tend to acquit rather than convict" and that his motive was not driven by the race of the struck jurors. Id.

Defense counsel's motion for mistrial was denied and the trial began.

There was no such extensive objection made in the present case or in the Morrison case. The record of Cochran and Morrison show that in both cases defense counsel made a written pro forma motion to restrict the state from arbitrarily striking blacks. After the jury was selected in both cases, there was no objection to the State's use of its peremptory strikes.

The other key difference between Floyd, Cochran, and Morrison is the manner in which the Batson issue was raised in the direct appeal process. In Floyd, the state court direct appeal process ended when the Alabama Supreme Court denied rehearing on February 28, 1986, prior to the decision of the United States Supreme Court in Batson

v. Kentucky on April 30, 1986.[13] Floyd timely filed a petition for certiorari in the United States Supreme Court and in that petition he raised the Batson issue. This was Floyd's first court filing after the Batson decision was announced and his only opportunity on direct appeal to raise his Batson challenge. Despite opportunities to do so, neither Morrison nor Cochran raised a Batson claim during their direct appeals process.

Floyd is the only decision that is an example of an Alabama court not applying a procedural bar to a Batson claim in a case similar to Cochran's. This Court has indicated that when state courts have

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[13]Floyd, like Cochran and Morrison, did not raise a Swain claim in the state appellate courts during the direct review process.

followed a rule "faithfully" in the "the vast majority of cases," and have deviated from the procedural bar in only a "few cases," those deviations may not establish failure "to apply procedural rule[s] regularly and consistently." Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989). The Alabama state appellate courts correctly applied the state procedural rule in the present case (Cochran) and the Morrison case.

In Dugger v. Adams, the death row inmate argued that the Florida Supreme Court did not consistently and regularly apply its procedural rules regarding Caldwell claims because in several cases the court addressed the merits of the argument. However, this Court ruled that "[i]n the vast majority of cases ... the Florida Supreme Court has faithfully applied its rule that claims not raised on direct appeal cannot be raised on post conviction

review. Dugger v. Adams, 489 U.S. at 410 n.6. Although only three Alabama cases share the same characteristics pertaining to the procedural context of the Batson claim the Alabama state appellate courts correctly applied state procedural grounds in a majority of the cases.

The Court of Appeals' decision in this case is also contrary to its own precedent. In Delap v. Dugger, 890 F.2d 285, 299-301 (11th Cir. 1989), the habeas petitioner argued that one prior decision of the Florida Supreme Court demonstrated that the procedural bar imposed by the Florida courts had not been regularly applied in similar circumstances. In rejecting this argument, the Court of Appeals held that, despite one prior decision of a state court ignoring a procedural default, Florida courts consistently applied the procedural bar. Delap v. Dugger, 890 F.2d at 300-301.

Likewise, the Alabama courts have consistently applied the procedural bar regarding Batson in cases such as Cochran's.

CONCLUSION

The State of Alabama respectfully requests that its petition for writ of certiorari be granted to review the important federal question raised by this petition. The Court of Appeals ruled that, in cases such as Cochran's, the Alabama courts have not consistently applied the rule of procedural default to Batson claims asserted in state collateral petitions where the defendant had raised a Swain objective at trial. Out of the three cases that are relevant, the Alabama state courts did not correctly apply the rule of procedural default in one of those cases. However, because of the Court of Appeals ruling in Cochran, both Cochran and Morrison will receive new trials despite

the state courts correctly applying the rule of procedural default. The State of Alabama respectfully requests that this Court grant certiorari because the Court of Appeals' decision is contrary to this Court's decision in Dugger v. Adams.

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